STATE OF MICHIGAN
IN THE SUPREME COURT

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, and RHONDA KELSO,

Plaintiffs-Appellees,

v

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.
_____/

Supreme Court No. 157335

Court of Appeals No. 335555

Court of Claims No. 16-000017-MM

Consolidated with Docket Nos. 335725 and 335726

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

DEFENDANTS-APPELLANTS GOVERNOR SNYDER, THE STATE OF MICHIGAN, THE DEPARTMENT OF ENVIRONMENTAL QUALITY, AND THE DEPARTMENT OF HEALTH AND HUMAN SERVICES' REPLY BRIEF

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

Richard S. Kuhl (P42042)
Margaret A. Bettenhausen (P75046)
Nathan A. Gambill (P75506)
Zachary C. Larsen (P72189)
Assistant Attorneys General
Attorneys for Defendants-Petitioners
Gov. Rick Snyder, State of Michigan, MDEQ, and MDHHS
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909

(517) 373-7540
kuhlr@michigan.gov
bettenhausenm@michigan.gov
gambilln@michigan.gov
larsenz@michigan.gov

Eugene Driker (P12959)
Morley Witus (P30895)
Todd R. Mendel (P55447)
Special Assistant Attorneys General
for Governor Richard D. Snyder
Barris, Sott, Denn & Driker, PLLC
333 W. Fort Street, Suite 1200
Detroit, MI 48226
(313) 965-9725
edriker@bsdd.com
mwitus@bsdd.com
tmendel@bsdd.com

Dated: April 26, 2018

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INTRODUCTION

It is the Legislature's prerogative to define the jurisdiction of the Court of Claims, but the Court of Appeals did not examine legislative intent when it ruled that emergency managers are state officials and employees. EM Defendants' answer demonstrates the confusion the Court of Appeals' opinion caused. If an official is a *state* official simply because the official's authority originates in the State, the official can be removed by the Governor, the official is regulated by the State, and the official serves state interests at a broad level, then there is no meaningful way to distinguish local officials from state officials. Indeed, by disregarding legislative intent and adopting a vague "totality of the circumstances" test, the Court of Appeals made it impossible for the Legislature to create officials like emergency managers *without* the judiciary automatically making them state officials. This was a violation of the separation of powers doctrine. Accordingly, this Court should reverse.

ARGUMENT

I. The Court looks to the entire record—not just Plaintiffs' complaint—for the facts.

The EM Defendants conclude that the Court should not look outside of Plaintiffs' complaint for the facts of this case. (EM Defs' Answer, p 1.) That is incorrect. As State Defendants explain in their application, the Court looks to the entire record. (State Defs' App, p 18.) This point is important because Plaintiffs' complaint contradicts the very documentation they attach to their complaint. For

example, the City of Flint chose to use the Flint River as an interim source of water before it could join the Karegnondi Water Authority; that decision was not made by the State. (*Id.*, p 4.)

II. Emergency managers are not state officials because the Legislature did not make them state officials.

Whether emergency managers are state officials is a question of legislative intent, not the common law. EM Defendants perpetuate the fundamental mistake the Court of Appeals made. They do not examine whether the Legislature *intended* to make emergency managers state officials. Instead, both EM Defendants and the Court of Appeals approach the question as if officials can be state officials even if the Legislature did not intend them to be because the judicial branch decides which officials are state officials. But neither the Court of Appeals nor EM Defendants cite any authority for this approach. That is because the existing authority confirms that whether a public official is a *state* official is a matter of legislative intent, not a question of common law for the courts. E.g, *Schobert v Inter-Co Drainage Bd of Tuscola, Sanilac & Lapeer Cos for White Creek No 2 Inter-Co Drain*, 342 Mich 270, 282 (1955).

The separation of powers concerns implicit in *Schobert* are even more pronounced in this case because the issue is not the jurisdiction of a constitutionally created circuit court like in *Schobert*, but that of the legislatively created Court of Claims—whose jurisdiction is governed entirely by the Legislature. See *Manion v State*, 303 Mich 1, 20 (1942).

Contrary to EM Defendants' accusation, State Defendants do not challenge the Court of Appeals' conclusion that the Court of Claims Act governs the jurisdiction of the Court of Claims and contains a definition of state officer. (EM Defs' Answer, p 4.) But that general statute does not answer the question of whether emergency managers are state officials. That Act simply defines "state . . . officers" as "an officer . . . of any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state" who "reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties." MCL 600.6419(7). No one disputes that EM Defendants were performing a governmental function within the scope of their authority during the time period relevant to this lawsuit. The question is whether the Legislature intended to make them "an officer . . . of this state." MCL 600.6419(7). The Court of Claims Act does not answer that question because it is silent regarding emergency managers. Instead, the answer is found in the more specific Local Financial Stability and Choice Act (PA 436), which created and governs the position of emergency manager. MCL 141.1541 *et seq*. See *Evanston YMCA Camp v State Tax Comm*, 369 Mich 1, 8 (1962) (specific provisions control over general provisions). That is why both the Court of Appeals and EM Defendants discuss PA 436 at length despite their confusing conclusions that PA 436 is a "red herring." (Opinion, pp 19–20; EM Defs' Answer, pp 5–7.)

There is *no* indication in PA 436 that the Legislature intended for emergency managers to be the types of state officials described in the Court of Claims Act. As State Defendants explain in their application, the plain language of the statute repeatedly distinguishes state officials from emergency managers. (State Defs' App, pp 45–47.) Additionally, the authority PA 436 gives emergency managers does not meet the factors this Court identified in *Schobert*. See *Schobert*, 342 Mich 270 at 284. That is, PA 436 does not authorize emergency managers to administer state affairs; it does not make emergency managers the heads of state departments; nor is the authority of emergency managers coextensive with state boundaries. *Id*.

Instead, emergency managers are authorized only to "act for and in the place and stead of the governing body and the office of chief administrative officer of the *local government*," MCL 141.1549(2) (emphasis added), and to exercise authority "solely, for and on behalf *of the local government*," MCL 141.1552(1)(dd) (emphasis added). That is why the Court of Appeals previously determined that even though the Governor appoints emergency managers, they act for the local government—*not* the Governor. *Kincaid v City of Flint*, 311 Mich App 76, 87–88 (2015). Like the officials in *Schobert*, who this Court held were *not* state officials, emergency managers perform functions that are "primarily local in extent and character." *Id*.

Moreover, while the State does fund part of the compensation emergency managers receive by paying their salaries, the local government provides the rest of their compensation. The local government must pay for "worker's compensation, general liability, professional liability, and motor vehicle insurance for the

emergency manager." MCL 141.1560(4). The local government also must pay for the "litigation expenses of the emergency manager" in the event "the emergency manager is subject to a claim, demand, or lawsuit arising from an action taken during the service of that emergency manager." MCL 141.1560(5). Thus, local governments must pay the judgments against emergency managers. *Id*. That is why Flint's Law Department represents EM Defendants in this proceeding.

These provisions of PA 436, which contemplate judgments against emergency managers and make the local government responsible for them, are in stark contrast to the way PA 436 contemplates the potential liability of state officials. The Legislature eliminates causes of action against state officials "for any activity authorized by" PA 436 or "any action taken by any local government" under PA 436. MCL 141.1572. As State Defendants explain in their application, sections 1560(4) and (5) would have no apparent meaning if the Legislature intended section 1572's elimination of causes of action against state officials to apply to emergency managers. (State Defs' App, p 46.) Additionally, judgments against state officials are paid by the state agencies on whose behalf the officials act. MCL 691.1408. Judgments against emergency managers, on the other hand, must be paid by the local government under emergency management. MCL 141.1560(5). That is because, as noted above, emergency managers act on behalf of the *local* government, not the state government. MCL 141.1549(2).

III. The Court of Appeals' and EM Defendants' conclusion that emergency managers are state employees is simply a disagreement with the Legislature's policy.

The Court of Claims Act gives that court jurisdiction over "employee[s] . . . of this state." MCL 600.6419(7). The Court of Appeals concluded that it is "beyond dispute" that because the Governor appointed EM Defendants and the State regulated them in some respects, emergency managers are automatically state employees. (Opinion, pp 20–21.) EM Defendants also advance this argument (EM Defs' Answer, n 3), which is surprising because they know their contracts indicate the opposite of the Court of Appeals' holding. Those contracts plainly indicate that emergency managers are *not* state employees. Paragraph 5.8 of each of them state that no "employer-employee relationship[ ] shall arise, accrue, or be implied to either party under this Contract . . . as a result of the performance of this Contract." These contracts are, and always have been, public documents, as they are required by law to be posted on both the local and state websites.[1] MCL 141.1549(3)(e); MCL 141.1557(f). They are attached for the Court's convenience. (Ex 1.)

What the Court of Appeals really did was disagree with the Legislature's policy choice. That is, the Court of Appeals held that it should not be possible for the State to appoint an official to oversee a municipality and pay part of that official's compensation without that official automatically becoming a state

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[1] Ambrose contract:
http://www.michigan.gov/documents/treasury/AmbroseContract_478988_7.pdf

Earley contract:
https://web.archive.org/web/20140305155315/http://www.michigan.gov/documents/treasury/Flint-EM-Contract-Earley_436789_7.pdf

employee. (Opinion, pp 20–21.) But why not? States have "absolute discretion" to design different types of local government within their jurisdictions. *City of Pawhuska v Pawhuska Oil & Gas Co*, 250 US 394, 397 (1919). States can either "appoint local officials," "elect them," or "combine the elective and appointive systems." *Sailors v Bd of Ed of Kent Co*, 387 US 105, 111 (1967). Thus, there is no reason why the Legislature cannot establish a policy that makes emergency managers local officials even though they are appointed by the State. The U.S. Court of Appeals for the Sixth Circuit has already concluded that the appointment of a local emergency manager does not violate the U.S. Constitution. *Phillips v Snyder*, 836 F3d 707, 715–16 (CA 6, 2016). And neither the Court of Appeals nor EM Defendants identify any other possible reason why the Legislature's preferred arrangement is somehow forbidden.

It is well-established that it "is not within the authority of the judiciary 'to redetermine the Legislature's choice or to independently assess what would be the most fair or just or best public policy.'" *Lash v City of Traverse City*, 479 Mich 180, 197 (2007), citing *Hanson v Bd of Co Rd Comm'rs of Co of Mecosta*, 465 Mich 492, 504 (2002). None of the language in PA 436 indicates that the Legislature intended to make emergency managers state employees (it indicates the opposite), and their contracts explicitly state that they are not state employees. By holding that the Legislature could not authorize the State to appoint emergency managers without automatically making them state employees, the Court of Appeals "rewr[ote] the

plain statutory language and substitute[d its] own policy decisions for those already made by the Legislature." *DiBenedetto v W Shore Hosp*, 461 Mich 394, 405 (2000).

IV. Just because the authority of emergency managers comes from the State does not mean they are state officials.

The main rationale used both by the Court of Appeals and EM Defendants is that regardless of what the Legislature intended, emergency managers are either state officials or state employees because their position was created by the Legislature, their authority originates from the State, and they are regulated in some degree by the State. (EM Defs' Answer, p 7–8, quoting the Opinion, pp 19–20.) But this rationale fails to recognize the fact that *all* government authority in Michigan originates in the State; *all* local officials and local governments are subject to state regulation; and *all* local officials can be removed by the Governor. That does not transform local entities into state entities, or local officials into state officials. See *Sailors*, 387 US at 107 ("Political subdivisions of States [exercise State-given authority but] . . . never were and never have been considered as sovereign entities.") (quotation omitted).

For example, the authority of local officials and boards is generally circumscribed by statute. See, e.g., MCL 41.426a (township park commission); MCL 64.10 (village treasurer); MCL 114.4s (city chief financial officer). The Governor can remove any local official (not just emergency managers) for cause. See, e.g., MCL 168.327 (removal of city officials); MCL 168.369 (removal of township officials); MCL 168.383 (removal of village officials). Finally, *all* local units of government are

required to make financial reports to the State Treasurer, not just those under emergency management. MCL 141.424; MCL 21.44. If a local unit fails to do so, the State can withhold revenue sharing payments. MCL 141.921(1). Any local unit that ends its fiscal year with a deficit—not just a unit under emergency management—is required to submit a plan to the State Treasurer within 90 days "for evaluation and certification that the plan ensures that the deficit condition is corrected." MCL 141.921(2). This state regulation does not transform local city administrators and financial officers into state officials.

EM Defendants' assertion that they are state officials because PA 436 serves the interest of the State in addition to the interests of the municipality under emergency management is equally unpersuasive. (EM Defs' Answer, p 8.) EM Defendants argue that they are state officials because they "exercise their State authority to benefit all Michiganders" since the solvency of local governments benefits the "health, safety, and welfare of the citizens of this state" and helps "protect the credit of this state and its political subdivisions." (*Id*., citing PA 436.) But by that rationale, mayors, administrators, city councilors, and other local officials would *also* be state officials since they *also* act to protect the solvency of their local jurisdictions. Indeed, as confirmed by the statutes requiring all local governments to report their financial standing to the State, "the management of local budgets is a matter of . . . state concern." *Rayford v City of Detroit*, 132 Mich App 248, 256 (1984). Like the officials at issue in *Schobert*, emergency managers and other local officials will always act to advance "the interest of the State" in

some "general sense." *Schobert*, 342 Mich 270 at 284. But that does not mean the Legislature intended to make them state officials.

As EM Defendants' answer demonstrates, by not basing its decision on the Legislature's intent, the Court of Appeals fails to provide limiting principles that meaningfully distinguish local officials from state officials. The question must be whether the Legislature *intended* an official to be a state official. Here, the plain language of PA 436 shows that the Legislature did *not* intend to make emergency managers the "state . . . officers" described in the Court of Claims Act. MCL 600.6419(7).

CONCLUSION AND RELIEF REQUESTED

State Defendants request that the Court vacate the Court of Appeals' opinion in its entirety and remand this case with direction to dismiss Plaintiffs' complaint. In the alternative, State Defendants request that the Court grant this application and permit briefing on all the substantive issues decided by the Court of Appeals.

Respectfully submitted,

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

/s/Nathan A. Gambill
Richard S. Kuhl (P42042)
Margaret A. Bettenhausen (P75046)
Nathan A. Gambill (P75506)
Zachary C. Larsen (P72189)
Assistant Attorneys General

Attorneys for Defendants-Petitioners
Gov. Rick Snyder, State of Michigan,
MDEQ, and MDHHS
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
kuhlr@michigan.gov
bettenhausenm@michigan.gov
gambilln@michigan.gov
larsenz@michigan.gov

Eugene Driker (P12959)
Morley Witus (P30895)
Todd R. Mendel (P55447)
Special Assistant Attorneys General
for Governor Richard D. Snyder
Barris, Sott, Denn & Driker, PLLC
333 W. Fort Street, Suite 1200
Detroit, MI 48226
(313) 965-9725
edriker@bsdd.com
mwitus@bsdd.com
tmendel@bsdd.com

Dated: April 26, 2018

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